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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 899

UNIVERSAL TERMINAL & STEVEDORING CORP.,

Petitioner,

against

ISBRANDTSEN COMPANY, INC.,

Respondent.

BRIEF ON BEHALF OF ISBRANDTSEN COMPANY, INC., IN OPPOSITION TO WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Counter-Statement to Questions Presented

Whether the Court of Appeals and the Trial Term of the State Court were correct in their findings that any unseaworthiness existing at the time of the accident was due to the stevedore's operations, which entitled the shipowner to recover under the terms of a written indemnity agreement which clearly established an intent to create responsibility on the stevedore irrespective of fault.

Statement of Facts

The plaintiff in the main action was an employee of C & W Ship Sealing & Servicing Co. which had been engaged by Isbrandtsen Company, Inc. to clean the SS.

"Sir John Franklin". On December 1, 1954 the Petitioner, Universal Terminal & Stevedoring Corp., hereinafter referred to as Universal, was discharging cargo from the #3 hatch aboard the vessel (R. 296). The longshoremen employed by Universal worked from 8:00 A. M. to approximately 5:00 P. M. The plaintiff, a cleaner employed by C & W Ship Scaling & Servicing Co., started work aboard the SS. "Sir John Franklin" at about 5:05 P. M. on December 1, 1954 (R. 62), and fell into the #3 hold at about 5:40 P. M. (R. 62).

Prior to his fall the plaintiff had descended from the main deck to the 'tween deck level of the vessel (R. 63), and was ordered by his superior to get a portable light which was lit in the far corner of the hatch (R. 64). After picking up the light, the plaintiff slipped on something under foot and fell through the hatch into the hold.

The evidence at the trial attributes plaintiff's fall to an open hatchway, inadequate lighting and the presence of debris under foot. The record disclosed that the plaintiff was employed to remove this debris and, accordingly, the Trial Court instructed the jury that unseaworthiness could not be premised upon the very condition that the plaintiff was there to remedy (R. 494-497) and, therefore, it appears that the jury's finding of unseaworthiness was either based upon the open hatches or inadequate lighting or a combination of both.

The undisputed evidence established that Universal's employees had removed the hatch covers (R. 346), and had left them off when they stopped work (R. 355). The portable lights which had been provided by the vessel were placed and arranged in the #3 hatch by the longshoremen (R. 350-351), and had been observed in the same position at about the time the longshoremen quit for the day (R. 354). Witnesses testified that these lights were still burning after the accident occurred.

The testimony also established that it is customary to close the top hatch at the main deck level when the long-

shoremen finish work at night (R. 356). The main deck hatch covers were left off presumably because the cleaners were to start work (R. 382), although the ship's officers did not specifically order the hatches left open (R. 380). It was uncontroverted that the longshoremen customarily leave the hatch covers off at the 'tween deck level when their work is to be continued the next day (R. 355), and the longshoremen did in fact finish their operations on the following morning (R. 354) and it was from the 'tween deck level that the plaintiff fell.

Prior to trial, the respondent served upon Universal a notice to admit pursuant to Section 322 of the New York Civil Practice Act. This notice, together with Universal's answers, was read into the record (R. 403-406), and Universal's admissions concede that on the date of the accident it was engaged in stevedoring services on the SS. "Sir John Franklin" in compliance with a stevedoring contract; that it removed the hatch boards at the #3 hatch; that it removed dunnage and left some in the cargo compartments; and that it placed the portable cluster lights in the #3 hatch and arranged them for use during the stevedore's discharging operations.

No evidence was introduced by the Petitioner to dispute the effect of the admissions contained in its answers to the notice to admit. The clause of the stevedoring contract by which Universal expressly agreed to indemnify Isbrandtsen stated as follows:

> "The contractor (Universal) will indemnify and hold harmless and defend Isbrandtsen Company, Inc., as owner or charterer of any vessel owned or chartered by it . . . against any and all claims or demands arising out of . . . bodily injury . . . which claims are made by or on behalf or (2) any other person, provided that such injury or death of such other person shall have been due to the contractor's (Universal) operation" (R. 404, 405).

After trial before the Court and jury, the Trial Judge submitted to the jury the issues between the plaintiff and

Isbrandtsen Company, Inc. in the main action on the sole ground of unseaworthiness and also submitted to the jury the cause of action based on Isbrandtsen's claim for common law indemnity and also for a breach of Universal's warranty of workmanlike performance (R. 444-502). The Trial Court reserved to itself the determination of the issues raised by the express agreement of indemnity between Universal and Isbrandtsen (R. 440-443). The Trial Judge directed judgment in favor of the respondent against Universal on the ground that the express indemnity agreement entitled Isbrandtsen to full indemnity. Specifically, it was found that whatever unseaworthiness caused the plaintiff's injuries was directly brought about by the actions of the stevedore and were due solely to its operations (R. 521).

The Appellate Division held that the plaintiff's injuries were not due to the stevedore's operations (R. 540-541), although it agreed that it was the duty of the Trial Judge to interpret the express indemnity contract. This decision of the Appellate Division was reversed by the Court of Appeals in which it held that the plaintiff's injuries were due to the stevedore's operations and that it would be liable under the broad provisions of its indemnity agreement. The decision of the Court of Appeals is reported at 11 N. Y. 2d 690.

REASONS FOR DENYING THE WRIT

I. The decision of the New York Court of Appeals is consistent with and in no way violates the holdings of the United States Supreme Court.

The decision of the Court of Appeals is not in conflict with the decisions of the Supreme Court in *Ryan Stevedoring Co.* v. *Pan Atlantic Steamship Co.*, 350 U. S. 124, and *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563, which cases are relied upon by the Petitioner seeking relief in this Court. Both of these

decisions relate to a right of indemnity by a shipowner against a stevedore based on a breach by the stevedore of an implied warranty to perform services for the vessel in a workmanlike manner. In neither of these cases was the Supreme Court concerned with the provisions of an express contract of indemnity.

A review of the authorities discloses that the Courts have regularly enforced indemnification contracts even where the indemnitor's assumption of liability was predicated on specific conditions. A concise review of the function of indemnity contracts in the maritime industry is contained in *Puleo* v. *Moss*, 2 Cir., 1947; 159 F. 2d 842, cert. den., 331 U. S. 847 (1947), one of the few decisions which considered an indemnification clause as broad as the one considered here. The pertinent clause provided that the contractor "save harmless . . . the owner of the vessel from all suits or actions . . . to which . . . the owner . . . may be subjected or put by reason of injury to the person or property of another arising . . . out of the performance of the contract by the contractor." The Court of Appeals for the Second Circuit awarded full indemnity to the shipowner from the contractor, a repair company, which had employed the injured plaintiff.

In analyzing the indemnity agreement, the Court pointed out that a contractual obligation to indemnify another does not depend upon the fault of the indemnitor. Full indemnity was given, but the Court stated specifically that it did not find the indemnitor at fault, as fault on the part of the contractor was not necessary to enforce the indemnity agreement.

At page 846, the Court described the indemnity arrangement as a business procedure which was a natural and reasonable reflection of the type of operations carried on by the parties. Here, it was stated:

> "Although this results in imposing upon the Robins Company liabilities for which the Moss Company

would have been solely liable even if the Robins Company did not need the protection of the statute, there is nothing surprising in that. *The parties were dealing only with imputed liabilities; the damages had to be paid by one of two groups of persons who would not be personally at fault anyway.* We are not to construe the contract as though the Robins shareholders had to pay losses for which the Moss shareholders would be responsible because of any personal delinquency. The losses were imposed as a condition of carrying on the business of the Robins Company; losses of a kind which it has long been the practice to treat as expenses of the business, and to spread over the whole business by insurance of one kind or another. It was in no sense unreasonable therefore that the Robins Company should be willing to escape controversies as to joint and several fault between itself and the ships that came to its yard, to accept liability for all accidents that might occur during repairs, and to load the contract price with the necessary premium." (Italics ours.)

The fact that the jury returned a verdict in favor of Universal on the cause of action based on common law indemnity and a breach of the implied warranty is not germane to the stevedore's liability under the terms of the expressed indemnity agreement. Liability of the stevedore based upon the implied warranty of performance depended upon proof that Universal had breached its implied warranty by doing its work improperly or incompetently. *Ryan v. Pan Atlantic Steamship Co., supra.* However, the reported decisions clearly indicate that the liability of the indemnitor under an express indemnity agreement does not depend upon proof of negligence.

A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co., 2 Cir., 1958; 256 F. 2d 227, app. dis., 1959; 358 U. S. 801.

Piezie v. *Erie Railroad Company*, 165 F. Supp. 216, 1958, aff'd 2 Cir., 1959; 264 F. 2d 136.

J. B. McNicholas Transfer Co. v. *Pennsylvania Railroad Company*, 6 Cir., 1946; 154 F. 2d 265.

Rice v. *Pennsylvania Railroad Company*, 2 Cir., 1953; 202 F. 2d 861.

Ferriman v. *Ocean Transport Ltd.*, 201 F. Supp. 173, 1961.

It is submitted that the Court of Appeals was correct in holding that the stevedore was liable under the terms of the express indemnity agreement. The words of the indemnity clause were clear and unambiguous and the evidence at the trial established that the plaintiff's injuries were a direct result of the stevedore's operations.

II. No basis for the granting of this petition for certiorari has been demonstrated by the petitioner.

The Petitioner has failed to establish that the decision of the New York Court of Appeals is in conflict with any decision of the Supreme Court of the United States or the Circuit Court of Appeals.

The New York Court of Appeals correctly interpreted the express contract of indemnity between the parties within the framework of the factual evidence presented at the trial. It is significant to note that the only decisions referred to by the Petitioner in support of this writ dealt with cases concerning the right of recovery against the stevedores by a shipowner based on breach by the former of an implied warranty. No reference is made to any decision dealing with an express indemnity clause between the shipowner and the stevedore. What the Petitioner is trying to do is to proceed by certiorari to review a decision of the New York Court of Appeals concerning the construction of a particular contract of indemnity. This agreement applied only to these parties, and has no application to the industry in general.

Even if the subject matter of this Petition is subject to the review of this Court, this relief should be denied, as no substantial Federal question has been raised by the Petitioner herein. The question which this Court is asked to decide is not of paramount importance to the shipping industry and the maritime bar. In recent years, the liability of stevedores under concepts of breach of implied warranty has been discussed and reviewed at great lengths in view of the decisions of the Supreme Court in *Ryan* and *Weyerhaeuser, supra.* The question of liability of stevedores to a shipowner under the terms of an express indemnity agreement have been of relative little importance because of the decisions relating to breach of implied warranty.

CONCLUSION

The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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